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Nos. 13-354 & 13-356

# In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS,

*v.*

HOBBY LOBBY STORES, INC., ET AL., RESPONDENTS.

CONESTOGA WOOD SPECIALTIES CORP, ET AL., PETITIONERS,

*v.*

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS.

On Writs Of Certiorari To The United States Courts Of Appeals For The Tenth And Third Circuits

## BRIEF OF U.S. SENATORS TED CRUZ, JOHN CORNYN, MIKE LEE, AND DAVID VITTER AS AMICI CURIAE SUPPORTING RESPONDENTS IN CASE NO. 13-354 AND PETITIONERS IN CASE NO. 13-356

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## INTEREST OF AMICI CURIAE[1]

Senators Ted Cruz, John Cornyn, Mike Lee, and David Vitter are United States Senators representing, respectively, the States of Texas, Texas, Utah, and Louisiana.

As elected representatives, the Senators have a powerful interest in preserving and protecting the constitutional and statutory rights of their millions of constituents. In particular, the Senators take seriously their responsibility to defend the right to freely exercise one's religious beliefs, as guaranteed by the First Amendment to the United States Constitution, as well as the right to practice one's faith without being substantially burdened by the federal government, as protected by the Religious Freedom Restoration Act.

Additionally, the Senators have long had an interest in the enforcement and constitutionality of the Patient Protection and Affordable Care Act of 2010 ("ACA") and its implementing regulations.

For example, one *amicus*, the Ranking Member of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, recently released a report that outlines the current Presidential

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than amici curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the respondents in Case No. 13-356 and the petitioners in both cases has filed a letter pursuant to Supreme Court Rule 37.3(a) reflecting consent to the filing of amicus curiae briefs in support of either party. Counsel of record for the respondents in Case No. 13-354 has individually consented to the filing of this amicus brief.

Administration's repeated attempts to ignore the ACA's statutory text.[2]

Another amicus, the Ranking Member of the Senate Judiciary Subcommittee on Immigration, Refugees, and Border Security, is a long-standing and stalwart advocate for religious liberty and against the ACA. For instance, in 2012, he demanded that this Administration withdraw the interim final rule implementing the ACA's contraception mandate at issue in this case, stating "that the rights of all individuals and entities to freely exercise their religious and moral beliefs [must be] both respected and protected."[3]

And another *amicus*, the Ranking Member of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, has been an outspoken critic of the Administration's attempts to amend the ACA's statutory text without congressional approval; supported legislation to protect the conscience rights of faith-based organizations by repealing the ACA's contraceptive mandate; and supported legislation to reverse the Administration's attempt to illegally amend the ACA's provisions requiring all Members of Congress and their staff to purchase health insurance through the exchanges.

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[2] U.S. Senator Ted Cruz, *The Legal Limit – Report No. 2: The Administration's Lawless Acts on Obamacare and Continued Court Challenges to Obamacare*, Dec. 9, 2013, http://www.cruz.senate.gov/?p=press_release&id=702.

[3] U.S. Senator John Cornyn, *Letter*, Feb. 8, 2012, http://www.cornyn.senate.gov/public/?a=Files.Serve&File_id=c70201f3-36b5-4778-a40e-64a4be33fae1.

## SUMMARY OF THE ARGUMENT

The Patient Protection and Affordable Care Act of 2010 ("ACA") was the signature policy achievement of the current Presidential Administration. Unfortunately, the actual implementation of the ACA has been beset by countless complications. Time and time again, this Administration has brazenly disregarded the very law that it championed. It has ignored the explicit language of the ACA to extend statutory deadlines, expand penalties, and grant additional subsidies to certain groups—all in order to further its own policy interests.

In stark contrast, the Administration is trying to vigorously enforce one particular aspect of the ACA's implementing regulations, the contraception mandate. This mandate, among other things, requires certain employers to provide contraceptive coverage to their employees, even when doing so would violate the employers' sincere religious beliefs.

This case does not implicate the individual right to access to contraceptives, which this Court's cases have long protected. Instead, it concerns whether the federal government can force employers to violate their good-faith religious belief and pay for the contraceptives of others.

Because the Administration has repeatedly ignored the explicit language of the ACA in other contexts, it cannot deny the same leniency to those acting on the basis of religious faith. The federal government cannot grant special favor to the secular over the religious. Accordingly, the contraception mandate cannot withstand scrutiny under either the First Amendment or the Religious Freedom Restoration Act ("RFRA").

By refusing to enforce several provisions of the ACA for its own secular policy reasons, the Administration has revealed that the contraception mandate is not a rule of general applicability, and is thus invalid under the First Amendment. And the Administration's repeated disregard of the express dictates of the ACA shows that the government lacks a compelling interest justifying the contraception mandate, under RFRA.

The law does not allow the Administration to suspend enforcement of various provisions of the ACA to serve its own political and policy interests, while trampling on the constitutional rights and religious freedoms of Americans by enforcing the ACA's contraception mandate.

## ARGUMENT

### I. The Administration Has Repeatedly Ignored The Explicit Statutory Mandates of the ACA.

The ACA has been billed as the "signature legislative achievement" of this Presidential Administration.[4] Yet, as shown by the five examples below, that same Administration has repeatedly disregarded and contravened the express text of the ACA.

#### A. Delaying the Health Insurance Requirements.

Without statutory authority, the Administration has unilaterally delayed the stringent requirements that the ACA establishes for the types of plans

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[4] Jonathan Weisman & Sheryl Gay Stolberg, *G.O.P. Maps Out Waves of Attacks Over Health Law*, N.Y. Times, Nov. 20, 2013, http://www.nytimes.com/2013/11/21/us/politics/gop-maps-out-waves-of-attacks-over-health-law.html.

health insurance companies can offer consumers. *See, e.g.*, 42 U.S.C. § 18022(b) (specifying several requirements for health benefits, including, for example, maternity and newborn care, prescription drug services, and chronic disease management).

These strict requirements have already led, by design and inevitability, to the cancellation of millions of health plans, as health insurance providers began cancelling plans that did not comply with the ACA.[5] This occurred despite the President's repeated assurances, both before and after the passage of the ACA, that nobody's plans would be cancelled.[6]

Now, however, the Administration has unilaterally declared that individuals can continue to purchase health care plans in 2014 even if those plans violate

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[5] *Policy notification and current status, by state*, Associated Press, Dec. 26, 2013, http://news.yahoo.com/policy-notifications-current-status-state-204701399.html (ACA standards have resulted in "at least 4.7 million" cancellations).

[6] The White House, Remarks by the President on Supreme Court Ruling on the Affordable Care Act, June 28, 2012, http://www.whitehouse.gov/the-press-office/2012/06/28/remarks-president-supreme-court-ruling-affordable-care-act ("if you're one of the more than 250 million Americans who already have health insurance, you will keep your health insurance"); The White House, Remarks by the President on Health Insurance Reform, University of Iowa Field House, Iowa City, Iowa, Mar. 25, 2010, http://www.whitehouse.gov/the-press-office/remarks-president-health-insurance-reform-university-iowa-field-house-iowa-city-iow ("You like your plan? You'll be keeping your plan."); The White House, Remarks by the President in Town Hall on Health Care, Aug. 15, 2009, http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-In-Town-Hall-On-Health-Care-Grand-Junction-Colorado/ ("if you like your your health care plan, you keep your health care plan").

the express requirements of the ACA and its regulations.[7]

To be sure, *amici* Senators emphatically believe that every American should continue to have access to these health insurance plans. But the text of the ACA does not permit the Administration to disregard the ACA's requirements unilaterally, and it has not sought to change the requirements legislatively. Indeed, in a nod to Lewis Carroll, the Administration has gone so far as to issue a veto threat for any legislation that codifies the exemption it has already unilaterally imposed.[8]

Rather than seek legislative action, the Executive Branch has done an end run around Congress by ignoring the ACA's statutory text, all to achieve its own political and policy interests.

**B. Delaying the Cap on Out-of-Pocket Costs.**

The Administration also decreed that the ACA's out-of-pocket caps would not apply in 2014. The

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[7] *See* Gary Cohen, *Letter to Insurance Commissioners*, Center for Consumer Information and Insurance Oversight, Nov. 14, 2013, http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF; *In reversal, Obama to allow canceled health plans*, Associated Press, Nov. 14, 2013, http://www.pbs.org/newshour/rundown/2013/11/obama-to-announce-fix-for-canceled-health-plans.html.

[8] *See* Jeff Mason & Roberta Rampton, *White House: Obama would veto Republican healthcare bill*, Reuters, Nov. 15, 2013, http://www.reuters.com/article/2013/11/15/us-usa-healthcare-veto-idUSBRE9AE03X20131115 ("President Barack Obama would veto a bill sponsored by a Republican congressman that would allow insurers to offer healthcare plans slated to be canceled because they do not meet the new U.S. healthcare law's standards, the White House said on Thursday.").

ACA caps the amount of out-of-pocket costs that people have to spend on their own health insurance. 42 U.S.C. § 18022(c)(1). Thus, by law, starting in 2014, individuals and families would have to spend no more than $6,350 and $12,700, respectively.[9]

But the Administration has unilaterally chosen to delay enforcement of this provision of the ACA—burying the announcement of the delay in one of 137 ACA FAQs found on the website of the Department of Labor.[10] The Administration has no statutory basis for delaying the out-of-pocket caps.

**C. Delaying the Employer Mandate.**

The Administration ignored the ACA again when it delayed the statute's employer mandate. Under the ACA, employers who employ over 50 "full-time" employees[11] are penalized if they do not offer health care coverage that the government deems to be "affordable," and an employee consequently receives a federal subsidy to purchase an insurance plan in a state health insurance exchange. *See* 26 U.S.C. § 4980H. This mandate was scheduled to take effect on January 1, 2014, along with most of the ACA. *See* The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1513(d), 124 Stat. 119,

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[9] *Revenue Procedure 2013-25*, Internal Revenue Service, http://www.irs.gov/pub/irs-drop/rp-13-25.pdf.

[10] *FAQs about Affordable Care Act Implementation Part XII*, United States Department of Labor, Feb. 20, 2013, http://www.dol.gov/ebsa/ faqs/faq-aca12.html.

[11] The ACA has redefined "full-time" employees to be those that work an average of 30 hours a week over the course of a month, as opposed to the traditional 40-hour work week. 26 U.S.C. § 4980H(c)(4)(A).

256 (2010) ("The amendments made by this section shall apply to months beginning after December 31, 2013.").

Yet the Administration announced—via blog postings—that it will not enforce the employer mandate at all in 2014.[12] As with the Administration's decision to delay the requirements on health care plans, the American people are better off without the employer mandate. But the text of the ACA does not allow the Administration to unilaterally delay its enforcement. Nevertheless, the Administration decided to disregard Congress and ignore the text of the ACA.

**D. Expanding the Employer Mandate Penalty.**

But the Administration did not stop at just delaying the enforcement of the employer mandate. It has also drastically expanded the employer mandate penalty beyond what the ACA allows.

Under the ACA, the employer mandate penalty is only supposed to be assessed if at least one full-time employee is enrolled in a health insurance exchange for which a federal tax credit subsidy is available. 26 U.S.C. § 4980H(a)-(b). Those federal subsidies are available *only* when an individual purchases a health plan "through an Exchange established *by the*

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[12] Valerie Jarrett, *We're Listening to Businesses about the Health Care Law*, The White House Blog, July 2, 2013, http://www.whitehouse.gov/blog/2013/07/02/we-re-listening-businesses-about-health-care-law; Mark J. Mazur, Continuing to Implement the ACA in a Careful, Thoughtful Manner, Treasury Notes, July 2, 2013, http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx.

*State*." 26 U.S.C. § 36B(c)(2)(a) (emphasis added). Thus, under the ACA's text, the subsidies are *not* available if the health plan is purchased through any other type of exchange, including federal exchanges.

At this time, 34 states have refused to create their own health insurance exchanges.[13] In those 34 states, no federal tax credit subsidies should be available, and employers in those states should accordingly not be subject to the employer mandate penalty.

Yet, they are. The Administration disregarded the plain language of the ACA and is now granting federal subsidies in all states, including those that have not created state health insurance exchanges.[14] The Administration has chosen to interpret "Exchange established by the State" to mean "a State exchange, regional exchange, subsidiary Exchange, and Federally-facilitated Exchange"[15]—that is to say, an actual state exchange plus three types of exchanges that are *not* "established by the State."[16]

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[13] *State Actions to Address Health Insurance Exchanges*, National Conference of State Legislatures, Jan. 13, 2014. http://www.ncsl.org/research/health/state-actions-to-implement-the-health-benefit.aspx; State Decisions For Creating Health Insurance Marketplaces, The Henry J. Kaiser Family Foundation, http://kff.org/health-reform/state-indicator/health-insurance-exchanges/.

[14] *See Health Insurance Premium Tax Credit*, 77 Fed. Reg. 30,377-78 (May 23, 2012) (to be codified at 26 C.F.R. pts. 1 & 602).

[15] *Id.* at 30,377-78, 30,387; 45 C.F.R. § 155.20 (cited in 26 C.F.R. § 1.36B-1(k)).

[16] One district court recently denied the government's motion to dismiss claims seeking to invalidate this interpretation. *Ok-*

[Footnote continues on next page...]

### E. Granting Subsidies to Members of Congress and to Congressional Staff.

Ignoring the clear language of federal statutes, the Administration unilaterally granted Members of Congress and congressional staff subsidies for their health care after they were forced, by the ACA, to buy health insurance through exchanges.

The ACA and other federal statutes contain explicit language requiring Members and their staff to be on the exchanges without subsidies—just as are millions of Americans. But, because that requirement is onerous, the Administration granted the request from Senate Majority Leader Harry Reid to disregard the plain language of the statute.[17]

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[Footnote continues from previous page...]
*lahoma ex rel. Pruitt v. Sebelius*, 2013 WL 4052610, No. CIV-11-30-RAW (E.D. Okla. Aug. 12, 2013).

Another district court upheld the government's statutory interpretation position as consistent with the overall context of the ACA. *Halbig v. Sebelius*, ___ F. Supp. 2d ___, 2014 WL 129023, No. 13-0623 (D.D.C. Jan 15., 2014). But even that court was forced to admit that its holding was contrary to the plain language of the law:

> On its face, the plain language of 26 U.S.C. § 36B(b)-(c), viewed in isolation, appears to support plaintiffs' interpretation. The federal government, after all, is not a "State," which is explicitly defined in the Act to mean "each of the 50 States and the District of Columbia." ACA § 1304(d), *codified at* 42 U.S.C. § 18024(d). The phrase "Exchange established by the State under [42 U.S.C. § 18031]" therefore, standing alone, could be read to refer only to state-run Exchanges.

*Id.* at *13.

[17] Neils Lesniewski, *Obama Solves Health Care Problem for Lawmakers, Staff*, Roll Call, Aug. 1, 2013,
[Footnote continues on next page...]

In the past, Members and congressional staffs have received a federal health care subsidy that covered almost 75% of their total premium costs.[18] These federal subsidies, however, were only available for health benefits plans that met a specific statutory definition: "a *group* insurance policy . . . for the purpose of providing, paying for, or reimbursing expenses for health services." 5 U.S.C. § 8901(6) (emphasis added).

As a result of the ACA, Members and most congressional staff are no longer allowed to purchase the group insurance policies that were originally available to them. Instead, they have to purchase *individual* health insurance plans from a health insurance exchange, just as millions of Americans are being forced to do now. 42 U.S.C. § 18032(d)(3)(D). Those plans are not group insurance plans; they are plans purchased by individuals for themselves or their families, rather than general plans negotiated for a block of employees. So starting in 2014, Members and congressional staff should not be receiving any federal subsidies for their health care plans, according to the U.S. Code.

But Members and staff are today receiving these subsidies, because the Administration decreed that these individual health insurance plans purchased

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[Footnote continues from previous page...] http://blogs.rollcall.com/wgdb/reid-says-issue-with-health-care-for-lawmakers-staff-is-resolved/.

[18] *Questions and Answers – Health Insurance Coverage: Members of Congress and Congressional Staff*, Office of Personnel Management, http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-204attachment2.pdf.

by Members and staff through health insurance exchanges qualify for subsidies under 5 U.S.C. § 8901.[19] It did so in response to entreaties by powerful Democratic Senators unhappy about the burdens the ACA was placing on them. But this special favor by the Administration directly violates the express requirement found in § 8901(6), which limits subsidies to "group" health insurance plans.

## II. The Administration's Conduct Demonstrates that Its Enforcement of the Contraception Mandate is Not a Rule of General Applicability, Nor Can It Be Justified by a Compelling Interest.

All the unilateral delays and waivers that the Administration has granted from ACA, as outlined in Part I, have direct legal consequences in this case. This Administration's pattern of ignoring the statutory text of ACA shows that its enforcement of the contraception mandate is not a rule of general applicability under the First Amendment, and also that it lacks a compelling interest to infringe on religious freedom under RFRA.

The First Amendment and RFRA protect the right to freely exercise one's religious beliefs. Accordingly, under the First Amendment, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc.*

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[19] John O'Brien, *Federal Employees Health Benefits Program: Members of Congress and Congressional Staff*, Office of Personnel Management, Aug. 7, 2013, http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-204.pdf.

*v. City of Hialeah*, 508 U.S. 520, 546 (1993). And under RFRA, the government cannot substantially burden a person's exercise of religion unless the government uses "the least restrictive means" of furthering "a compelling governmental interest." 42 U.S.C. § 2000bb-1.

The Administration's conduct in ignoring other provisions of the ACA, as explained in Part I, reveals that the contraception mandate is *not* a rule of general applicability under the First Amendment. The various delays and exceptions that the Administration has announced all have one effect: exempting even more health care plans from the requirements of the ACA. In each instance, the beneficiaries of these exemptions are the politically powerful and well-connected. The Administration, however, refuses to grant the same leniency to those for whom the contraception mandate violates their sincere religious beliefs.

On its face, this double standard violates the First Amendment's general applicability requirement. *See, e.g.*, *Church of the Lukumi Babalu Aye*, 508 U.S. at 537 ("in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason" (quotations and citation omitted)); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (providing secular exemptions "while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*") (Alito, J.).

Moreover, and for largely the same reasons, the Administration's delays and waivers for other provi-

sions of the ACA confirms that the contraception mandate does not serve a compelling interest. The government has attempted to justify its enforcement of the contraception mandate primarily on the basis that it has a compelling interest in providing a "comprehensive insurance system with a variety of benefits available to all participants." Br. of Petitioners at 14, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S.). But the numerous and varied exceptions to the ACA that the government has already authorized contradict this stated interest. The government has repeatedly ignored the express text of the ACA, when doing so will serve its own political and policy goals, even when their actions result in a failure to ensure a "comprehensive insurance system."

In fact, it appears the contraception mandate itself has been delayed, in part, as a result of some of the Administration's actions. For example, delaying enforcement of the ACA's health insurance requirements, *see supra* Part I.A, could allow plans that do not provide contraception coverage to continue to be offered in 2014.

The constitutional and statutory rights of all Americans to exercise their religion cannot be trumped by this Administration's supposed interest in a "comprehensive insurance system," when the Administration has repeatedly and unilaterally granted waivers and delays to other beneficiaries under the ACA. This Administration has ignored the ACA when it serves its own political interests, but it continues to force countless individuals to abide by the contraception mandate and violate their sincere religious beliefs. That contravenes the First Amendment and RFRA.

## CONCLUSION

The judgment of the U.S. Court of Appeals for the Tenth Circuit should be affirmed, and the judgment of the U.S. Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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